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In the

Supreme Court of the United States

OCTOBER TERM, 1971

HENRY BESSESEN and BUNI BESSESEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUPREME COURT, U. S.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on July 6, 1971 affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the petitioners guilty of various violations of Title 18, United States Code, Section 1341. Henry Bessesen was sentenced to the custody of the Attorney General of the United States for a period of five years on Counts 1 and 2 of the indictment, the sentences to run concurrently, and for five years on Counts 3, 4 and 5, the sentences to run concurrently, but consecutively to the sentences imposed

on Counts 1 and 2 and to sentences theretofore imposed upon him by the United States District Court for the District of Minnesota, Fourth Division, which he is now serving. Buni Bessesen was sentenced to the custody of the Attorney General for a period of one year on Count 4 of the indictment and placed on probation for a period of five years on Count 5.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois was entered on December 2, 1969, without opinion and is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court was filed July 6, 1971, No. 18319, and is not yet reported, but is set forth in the Appendix.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on July 6, 1971 and a timely petition for a rehearing was denied on August 19, 1971. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Were petitioners' rights of confrontation of witnesses pursuant to the provisions of the Sixth Amendment violated by the admission of hearsay testimony pertaining to a material issue?

2. Did the court's failure to instruct the jury pertaining to petitioners' specific theory of defense constitute a denial of due process?

3. Did the trial court improperly permit the jury to convict the petitioners on the basis of negligence?

4. Were the petitioners' rights pursuant to the Fifth Amendment violated by the lengthy, unexplained delay between the dates of the offense and the return of the indictment?

STATUTES INVOLVED

Amendment V. United States Constitution.

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Amendment VI. United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted with the witnesses against him . . .

Rule 52. Federal Rules of Criminal Procedure.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Petitioner Henry Bessesen, also known as Henry J. Adrian, and his wife, Buni Bessesen, also known as Buni Adrian, were indicted in each count of a five count indictment charging them with violations of the mail fraud statute, Title 18, United States Code, Section 1341.

Mr. Bessesen was found guilty by a jury on all of the counts while Mrs. Bessesen was convicted on only counts 4 and 5.

For purposes of this petition the restatement of the facts contained in the opinion of the Seventh Circuit is adopted.

REASONS FOR GRANTING THE WRIT

1. PETITIONERS' RIGHT OF CONFRONTATION OF WITNESSES PURSUANT TO THE PROVISIONS OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS VIOLATED BY THE ADMISSION OF HEARSAY TESTIMONY PERTAINING TO A MATERIAL ISSUE.

Petitioners' defense in the trial court was primarily based upon the fact that they were relying upon the promises that a Mrs. Leah Rosa Simpson would make sums of money available to cover all of the checks which had been written and drawn against insufficient funds. However, Mrs. Simpson was not called as a witness by either the prosecution or the defense.

In attempting to negate the petitioners' theory of defense and to establish the fact that Mrs. Simpson had herself been the victim of a fraud perpetrated upon her by petitioner, Henry Bessesen, the Government called Burt L. Haberman, an attorney from Tucson, Arizona, who had represented Mrs. Simpson in her legal affairs. Mr. Haberman testified, in part, on direct examination, as follows (TR.[1] 787-789, A.[2] 93-96):

"A (Continuing.) — that we had heard rumors among real estate circles in town that Mr. Adrian was operating the Tucson Inn and had somehow purchased the stock and we wanted to know whether or not he had done so by get-

[1] "TR." refers to transcript of proceedings filed in the lower court.

[2] "A." refers to Appendix filed by the petitioners in the lower court.

ting Mrs. Simpson to co-sign the notes, because we had talked to Mrs. Simpson when we heard these rumors and asked her if she had done it and she said no, and he said yes, that she had co-signed the notes.

Q. In regard to those promissory notes, was that the last you heard of those notes, sir?

A. No, it was not, unfortunately.

Q. When was the next time that those promissory notes were brought to your attention?

A. In August — well, one of them in August of 1965 when she was sued for $287,500 plus interest and costs by Mr. Phil Baker, who was a holder of one of the notes.

Q. What was your primary defense to that lawsuit?

A. The primary defense was that if she had indeed signed the note at all, her signature on the note was secured by trick, by artifice, by fraud, by misrepresenting the character of the instrument that she signed as a promissory note — not as a promissory note but as something else.

Mr. Oliver (defense counsel): I object. He is getting into the defense in another lawsuit.

The Court: Do you have any comment?

Mr. Krajcir (Government attorney): Well, your Honor, I think the defendant has made those promissory notes the key to his case, and anything that sheds light on those promissory notes is going to be of assistance to this jury.

The Court: He may answer. Or the answer may stand. Have you finished your answer?

The Witness: Yes, your Honor.

The Court: All right."

By the use of this hearsay testimony the Government was permitted to get into the record a denial by Mrs.

Simpson that she had ever signed the notes for the Tucson Inn, and that if her signature was on the notes, it was obtained by the petitioner, Henry Bessesen, "by trick, by artifice, by fraud, by misrepresenting." Properly, the only person who could have testified to the circumstances of the note signing was Mrs. Simpson herself. However, by allowing testimony in this form, the statement of Mr. Haberman had the effect of making Mrs. Simpson a witness against the petitioners without also giving them the opportunity to be confronted with her testimony or to cross examine her, rights guaranteed to them by the Sixth Amendment. The testimony further had the effect of completely emasculating the good faith defense and the defense of reasonable expectation of payment that had been presented by the petitioners.

The ruling of the court below is in conflict with decisions of this court pertaining to a defendant's confrontation rights pursuant to the Sixth Amendment of the United States Constitution. In *Pointer* v. *Texas,* 380 U.S. 400, 405, 85 S.Ct. 1065 this court stated:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." 380 U.S. at page 405.

In *Barber* v. *Page,* 390 U.S. 719, 88 S.Ct. 1318, this court stated that the primary object of the confrontation clause of the Sixth Amendment was the compelling of a witness to stand face to face with the jury in order that the jury could look at him, and judge from his demeanor upon the stand and from the manner in which testimony is given

whether he is worthy of belief. This court also stated that the right to confrontation is basically a trial right and it includes both the opportunity to cross examination and the occasion for the jury to weigh the demeanor of the witness.

A. The Admission of Mr. Haberman's Testimony was so Prejudicial as to Constitute Plain Error.

On page 11 of its slip opinion, the court below stated that it was not obligated to consider this contention on appeal for the reason that the contention of hearsay was not raised in the court below and that the testimony was not of such prejudicial magnitude to constitute plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.

However, the crux of the petitioners' theory of defense was their contention that they did not entertain an intent to defraud inasmuch as they had been relying upon Mrs. Simpson's assurances that she would cover their overdrafts. Therefore, testimony pertaining to the circumstances surrounding the execution of these notes was crucial in deciding the critical issue of intent. For the court below to state that trial counsel did not specifically state the objection to the complained of testimony is placing too strict of an interpretation upon Rules 51 and 52 of the Federal Rules of Criminal Procedure. Although trial counsel, in objecting to this testimony, did not specifically use the word "hearsay" as being the basis of his objection, the ground urged by counsel was adequate to preserve it for appeal.

The error in admitting this testimony of Mr. Haberman was of the type referred to by this Court in the case of

Kotteakos v. *United States,* (1946) 328 U.S. 750, 66 S.Ct. 1239, wherein it was stated:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . but if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S. at pages 764-765.

Undoubtedly, this hearsay testimony which tended to eradicate the petitioners' theory of defense must have had substantial influence on the jury in reaching its verdict.

Certainly it cannot be stated here that the admission of this testimony into evidence was harmless beyond a reasonable doubt. See *Chapman* v. *California,* (1967) 386 U.S. 18, 87 S.Ct. 824.

B. The Ruling Below Is In Conflict With Other Circuits.

The ruling of the court below is also in conflict with the rulings of other circuits. In *United States* v. *Pennix,* 313 F.2d 524, 527 (4th Cir. 1963), the Court stated that although a specific objection is generally required before a ruling of the trial court may be attacked as error, this rule is neither absolute nor inflexible, and the Appellate Courts are expressly authorized to notice plain errors

or defects affecting substantial rights even though they were not brought to the attention of the court by timely objection.

The Seventh Circuit has long held that it was not necessary for a defendant to prove that an alleged error did in fact influence the jury's verdict in order for it to be prejudicial. See *United States* v. *Dressler,* 112 F.2d 972, 978 (7th Cir. 1940), wherein the Court stated:

> "'. . . where error occurs which, within the range of a reasonable possibility, may have affected the verdict of the jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. * * * The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand.'"

The factual situation in the cases relied upon by the Seventh Circuit in reaching its conclusion are at variance with the factual situation in the case at bar.

The cases of *United States* v. *Rosenberg,* 195 F.2d 583, 596 (2nd Cir. 1952); *United States* v. *Marine,* 413 F.2d 214, 218 (7th Cir. 1969); *United States* v. *Cook,* 432 F.2d 1093, 1103 (7th Cir. 1970) cited by that Court in support of its opinion involved situations where *no* objections were made in the trial court.

In the case of *United States* v. *Indiviglio,* 352 F.2d 276, 279-80 (2nd Cir. 1965), the court refused to consider the contention of error raised on appeal because a determination would necessitate a hearing concerning collateral matter that was not part of the trial record. In the case of *United States* v. *Turner,* 423 F.2d 481, 484 (7th Cir. 1970), also cited by the court below, the complained of error did not involve a matter that was directly in issue in the case,

but rather involved whether or not a defense witness had been properly impeached during cross examination.

In *United States* v. *Regents of New Mexico School of Mines,* 185 F.2d 389 (10th Cir. 1950), the plaintiff opened the door to evidence that was not relevant to the issues of the case. The Court then permitted the defendant to introduce other testimony bearing upon that field of inquiry. However, the testimony of the Bessesens pertaining to their relationship with Mrs. Simpson had a direct bearing upon the issue of intent, and all of their testimony pertaining to their relationship with her was competent evidence. Although Mr. Haberman could properly testify to conversations between Mrs. Simpson and the Bessesens at which he was present, the trial court erred in admitting testimony as to conversations he had with Mrs. Simpson outside the presence of the defendants and especially those conversations with her pertaining to the development of a theory of defense in the suit brought against her by the holders of the promissory notes, some two years later. Only Mrs. Simpson would have been a competent witness to testify pertaining to that portion of Mr. Haberman's testimony.

There are many cases from other circuits supporting the petitioners' position. Among these are *Culwell* v. *United States,* 194 F.2d 808, 810 (5th Cir. 1952); *Naples* v. *United States,* 344 F.2d 508, 513 (D.C. Cir. 1964); *Pinkard* v. *United States,* 240 F.2d 632, 633 (D.C. Cir. 1957); *United States* v. *Dunn,* 299 F.2d 548, 554 (6th Cir. 1962); *Glenn* v. *United States,* 271 F.2d 880, 883 (6th Cir. 1959); *United States* v. *Readus,* 367 F.2d 689, 691-92 (6th Cir. 1966); *Simmons* v. *United States,* 206 F.2d 427, 429 (D.C. Cir. 1953); *Landsdown* v. *United States,* 348 F.2d 405, 412-13 (5th Cir. 1965).

C. The Court's Instructions Emphasized the Prejudicial Effect of the Hearsay Testimony.

The prejudicial effect of Mr. Haberman's testimony was unduly emphasized by the following jury instruction given by the trial judge:

"If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness creates the presumption that his testimony would be unfavorable to such party. However, no such presumption should be drawn by you where the witness is equally available to both parties, or where the witness's testimony would be merely cumulative." (A. 103-104) (Emphasis Added.)

Having heard the testimony of Mr. Haberman that Mrs. Simpson denied the execution of the promissory notes, or that in the event she had executed these notes, her signature was obtained by means of fraud, deceit or misrepresentation, the jury was then told, in effect, that it could treat the petitioners' failure to produce Mrs. Simpson as a witness to rebut Mr. Haberman's testimony as a fact that Haberman's testimony pertaining to Mrs. Simpson's denial was true.

However, the petitioners did unsuccessfully request a recess of the trial for the purpose of subpoenaing Mrs. Simpson as a witness. (Tr.S.[3]9)

In a very recent case from the Seventh Circuit, *Simmons* v. *United States,* 440 F.2d 890 (1971), it was stated:

> "It seems to us, however, that where an extrajudicial declaration used under circumstances such that the

[3] "Tr.S." refers to a supplemental transcript of proceedings filed in the lower court.

opportunity to cross-examine the declarant is essential to a defendant's right of confrontation, it must be the Government's burden to produce the declarant. Mere availability, in the sense that defendant could have subpoenaed him, does not, in our opinion, suffice him." 440 F.2d at page 891.

2. THE COURT'S FAILURE TO INSTRUCT THE JURY PERTAINING TO PETITIONERS' SPECIFIC THEORY OF DEFENSE CONSTITUTED A DENIAL OF DUE PROCESS.

Nothwithstanding the fact that the petitioners' tendered instructions pertaining to their specific theory of defense to the charges in the indictment, the trial judge wrongfully refused to so instruct the jury. The tendered instructions were as follows:

> "The defendant Buni Bessesen takes the position that at the times alleged in the indictment, she did not know the state of the bank accounts upon which checks were drawn which bears her signature. She contends that at all relevant times, she acted under the direction of her husband, the other defendant. She further contends that her only function in the check transactions was to affix her signature to those checks which bear her signature, that she did so in the belief that the checks which she signed were checks issued in the ordinary and proper course of business. Finally, it is her contention that she knew that one Leah Rosa Simpson had an interest in the business known as the Tucson Inn in Tucson, Arizona, and believed that Mrs. Simpson was backing the venture financially.
>
> "I instruct you that if Mrs. Bessesen did not have knowledge of the nature of the transactions of which the government complains, then you must find her not guilty. In that connection, if the government's evidence fails to convince you beyond a reasonable doubt that Mrs. Bessesen had such knowledge, or if

the evidence from the defense creates a reasonable doubt in your minds as to her knowledge, then you should find Mrs. Bessessen not guilty.

"It is the contention of the defendant Henry Bessesen that while he knew that checks which he was depositing in banks and checks drawn upon those deposits were checks which were drawn against uncollected funds, that he had no intention of defrauding the several holders of the checks. It is his further contention that at all times relevant to the transactions of which the government complains, that he was relying upon one Leah Rosa Simpson to make sums of money available to him to restore the bank accounts to a condition of solvency. It is defendant Henry Bessesen's further contention that Mrs. Simpson's obligation to assume financial responsibility for matters pertaining to the operation of the Tucson Inn followed from the fact that Mrs. Simpson, was, according to Mr. Bessesen, the true owner of the Tucson Inn. It is defendant Henry Bessesen's further contention that shortly after the acquisition of the Tucson Inn by himself and Mrs. Simpson that he in fact made disbursements of checks to persons having claims against the Tucson Inn and, in fact, there were not sufficient funds in the banks against which those checks were drawn to cover the checks. In that connection, it is Mr. Bessesen's further contention that he made those disbursements upon Mrs. Simpson's assurance that she would provide the funds to insure that the checks would be honored and that initially she did in fact provide such funds so that such checks were honored. He contends that a day came when Mrs. Simpson was tardy in providing funds to cover checks which he had written, but that she assured him that such funds would be made available and that upon the strength of her assurances he continued in business.

"I instruct you that Mr. Bessesen's intentions to meet the obligations represented by the checks in ques-

> tion at the time of presentation of those checks to the affected banks is inconsistent with an intention to defraud. In this case, the government must prove beyond a reasonable doubt that the defendants did in fact intend to defraud the affected banks. If you have a reasonable doubt that Mr. Bessesen actually intended to defraud any of the banks in question, then you must find him not guilty." (Tr. 867-870)

In its ruling the court below stated that the giving of the general instructions pertaining to mail fraud and the defense of good faith was adequate, and therefore, the failure to give the quoted instructions was not error. However, this ruling is in conflict with many decisions of the other circuits as well as of the Seventh Circuit itself.

The ruling of the court below is also more perplexing for the reason that the court below conceded on page 6 of its opinion that the petitioners' theory that "they entertained a reasonable expectation that sufficient funds would be deposited by Mrs. Simpson in time to pay the checks when they were ultimately presented for payment" is supported by law. The only instruction given by the trial court relating to the theory of reasonable expectation that there would be sufficient funds at the time of presentment of the drafts was the following:

> "However, if you believe beyond a reasonable doubt that the defendants, when they put in circulation or caused to be put in circulation the checks which are in evidence, knew that the funds in the bank accounts on which these checks were drawn were insufficient to pay these checks on presentation, and that the defendants further knew that in the ordinary course of events there would not be sufficient funds in the bank accounts of the drawee banks to pay these checks

> when they were presented other than by the deposit in rapid succession of other checks drawn by the defendants which they knew or should have known were insufficient fund checks themselves, in an endless chain, then you will be justified in finding that the necessary intent to defraud existed" (A. 110).

However, this instruction was confusing inasmuch as it improperly emphasized the government's theory of the case, while at the same time it so disguised the petitioners' theory of reasonable expectation of payment that it could only confuse the jury as to whether or not this theory was a proper and legal defense upon which the petitioners could rely and had the effect of reducing the petitioners' theory of defense to a nullity.

The Second Circuit recently held in *United States* v. *Platt,* 435 F.2d 789, 792 (1970) that although the trial judge was not required to instruct the jury in the form submitted by the defendant, his failure to give any instructions relating to the defendant's theory of defense was tantamount to the judge's withdrawing that point from the jury's consideration.

In the case of *Perez* v. *United States,* 297 F.2d 12 (1961), the Fifth Circuit, in reversing the defendant's conviction, stated as follows:

> "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence . . . a charge is erroneous which ignores a claimed defense with such a foundation . . . the charge to which he is entitled, upon proper request, in such circumstances is one which precisely and specifically rather than merely generally or abstractly points to his theory of defense, . . . and one

which does not unduly emphasize the theory of the prosecution, thereby de-emphasizing proportionately the defendant's theory." 297 F.2d at pages 15-16.

In *Strauss* v. *United States,* 376 F.2d 416 (1967), the Fifth Circuit also stated:

> *"We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense.* The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible."
>
> * * *
>
> "The proper standard was not met here. *The jury did not have to believe the defenses, but it should have been given the opportunity. This is true even if the defense is fragile. A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge."* 376 F.2d at page 419. (Emphasis added)

The Seventh Circuit has on numerous occasions held that a defendant was entitled to have the jury instructed relating to his specific theory of defense. See *United States* v. *Indian Trailer Corporation,* 226 F.2d 595, 598 (1955); *United States* v. *Grimes,* 413 F.2d 1376, 1378 (1969); *United States* v. *Vole,* 435 F.2d 774, 776 (1970).

The District of Columbia Circuit, in *Williams* v. *United States,* 131 F.2d 21, 23 (1942) stated that a trial by a jury of peers "is supposed to safeguard our institution of fair

trial by insuring impartiality. But of what value is an open mind if it does not know, with clear delineation, the issues upon which it is to pass judgment?" See also *Tatum* v. *United States,* 190 F.2d 612, 617 (1951).

3. THE TRIAL COURT IMPROPERLY PERMITTED THE JURY TO CONVICT ON THE BASIS OF NEGLIGENCE.

Despite the objection of the petitioners, the court instructed the jury as follows (A. 110):

> "However, if you believe beyond a reasonable doubt that the defendants, when they put in circulation or caused to be put in circulation the checks which are in evidence, knew that the funds in the bank accounts on which these checks were drawn were insufficient to pay these checks on presentation, and that the defendants further knew that in the ordinary course of events there would not be sufficient funds in the bank accounts of the drawee banks to pay these check when they were presented other than by the deposit in rapid succession of other checks drawn by the defendants which they knew *or should have known were insufficient fund checks themselves,* in an endless chain, then you will be justified in finding that the necessary intent to defraud existed." (Emphasis Added)

This instruction was improper inasmuch as it permitted the jury to find that the requisite criminal intent was proven despite the fact that the petitioners may not have had actual knowledge of the fact that the checks were drawn against insufficient funds.

The ruling of the court below is in conflict with the rulings of other circuits pertaining to the requisite criminal intent which must be proven in order to sustain a conviction.

In *Shaddy* v. *United States,* (8th Cir. 1929) 30 F.2d 340, the trial judge instructed the jury to the effect that "if a man knows or should know, as a reasonable man, that the act which he is about to commit naturally, inevitably and necessarily will have the effect of injuring or defrauding another, . . . then you will be justified in finding he had the necessary intent." In reversing the conviction the Court of Appeals stated:

> "It was error also to charge that the defendant might be found to have had a criminal intent from what *he should have known as a reasonable man* would naturally, inevitably and necessarily injure or defraud another, as it justified a finding of such intent from a breach of duty or want of understanding, whereas, unfounded as the representations in this case appeared to be, the fact was but evidentiary upon the crucial issue of intent." 30 F.2d at page 342. (Emphasis added)

In *Phillips* v. *United States,* (9th Cir. 1965) 356 F.2d 297, 306, the court held that "[W]here documents were admitted on the theory that a defendant's actual knowledge of them shows that he must have realized the scheme was fraudulent, the jury should be told in plain and direct language, that such documents may be considered only if it has been independently shown that such defendant had *actual knowledge* of the documents while the asserted scheme was in progress." (Emphasis Added)

In *Jacobs* v. *United States,* (8th Cir. 1966) 359 F.2d 960, 966, the defendant was convicted of various violations pertaining to defrauding the Commodity Credit Corporation. In reversing the conviction the court stated that a defendant could not be convicted where it was shown that he may have acted carelessly or even foolishly, since care-

lessness or lack of wisdom is not equivalent to the knowledge of falsity.

The giving of this instruction was especially confusing to the jury in Mrs. Bessesen's case even though the trial judge instructed the jury that they should acquit Mrs. Bessesen in the event they found that her acts were "without knowledge of the character and nature of the transactions that took place" (A. 110). As a result of the objected to instruction, the jury was undoubtedly led to believe and under the impression that they could convict Mrs. Bessesen even though she did not have *actual* knowledge of the character and nature of the transactions, and that a guilty verdict could result from the mere fact that she might have been negligent or careless in not knowing the true nature of these check transactions. See also *Schneider* v. *United States,* (9th Cir. 1951), 192 F.2d 498, 502, which held that a person could not be convicted of a crime involving specific intent on the basis of criminal negligence.

4. THE PETITIONERS WERE PREJUDICED BY THE LENGTHY, UNEXPLAINED, DELAY BETWEEN THE DATES OF THE OFFENSES AND THE RETURN OF THE INDICTMENT.

Although the indictment in this cause alleged that the petitioners devised a scheme to defraud during the period of on or about March, 1963, to on or about June 30, 1963, the indictment was not returned until May 23, 1968. (A. 1-9) The actual mailings alleged in the five counts were on May 23, 1963; May 24, 1963; May 25, 1963; May 27, 1963; and May 27, 1963, respectively. Thus there was a lapse of approximately 5 years between the dates of the occurrence of the offenses and the return of the indictment.

The petitioners were interviewed by an agent of the F.B.I. during September, 1963, pertaining to the subject

matter of the indictment (A. 64). Thus, even though the federal government was aware of the petitioners' activities in 1963, for some unexplained reasons, the government did not see fit to return the indictment until approximately five years later.

The unexplained delay violated petitioners' rights of due process pursuant to the provisions of the Fifth Amendment to the Constitution. In recent years the lower courts have enunciated the principle that not only is an accused entitled to a speedy trial once an indictment is returned but also that he is entitled to have his case presented to a grand jury without undue delay notwithstanding the fact that the indictment may be returned within the applicable period of the statute of limitations.

Absent a showing by the government of the reason for the undue delay in returning the indictment in the instant cause, the government's inaction for such a long period of time as here should be considered prima facie prejudicial to the petitioners unless the government can demonstrate some overriding public interest for its inaction.

As this Court recently stated in *Dickey* v. *Florida*, 398 U.S. 30, 90 S.Ct. 1564:

> "If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. * * * the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial. * * * Here, however, no valid reason for the delay existed; it was exclusively for the convenience of the State. On this record the delay with its consequent prejudice is intolerable as a

matter of fact and impermissible as a matter of law." 393 U.S. at pages 37-38.

In *Ross* v. *United States,* (D.C. Cir. 1965) 349 F.2d 210 and *Woody* v. *United States,* (D.C. Cir. 1966) 370 F.2d 214, the court, after remand for a hearing to determine the reasonableness and the effect of the delay on the defendant's presentation of his case, held that the delay between the date of the alleged offense and the defendant's arrest was violative of his rights pursuant to the Fifth Amendment to the Constitution. In both of these cases the delay was less than a year.

See also *Hedgepeth* v. *United States,* (D.C. Cir. 1966) 364 F.2d 684 wherein the court stated in footnote 3, page 687:

> "The possibility of prejudice from the delay is an important factor in close cases. But the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay."

In *United States* v. *Blanca Perez,* (S.D. N.Y. 1970) 310 F.Supp. 550, 551, the court stated, in granting a motion to dismiss the indictment, because of the four year delay from the government's filing of a bill of particulars to trial, that such a delay was not only undue delay, but it was also prima facie prejudicial.

Mr. Bessesen was especially prejudiced by this undue delay because the government was able to impeach his credibility by the introduction of a mail fraud conviction which occurred in March, 1969 (A. 78). Had the indictment in this cause been returned promptly after the government

became aware of the activity, he would have been able to testify without the stigma attached to a convicted felon, and his testimony might have been more believable in the eyes of the jury.

Mrs. Bessesen was similarly prejudiced because she relied heavily upon Mr. Bessesen's testimony in establishing her defense. Had not his testimony been tainted by the introduction of a prior mail fraud conviction, it is very likely that a different verdict might have been reached by the jury.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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Chicago, Illinois 60603

APPENDIX

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18319
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
HENRY BESSESEN AND
BUNI BESSESEN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 6, 1971

Before KILEY, FAIRCHILD and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* Henry A. Bessesen, also known as Henry J. Adrian, and his wife, Buni A. Bessesen, also known as Buni A. Adrian, were charged in each count of a five-count indictment with mail fraud violations of 18 U.S.C. §1341.

Henry Bessesen was found guilty by a jury on all counts and was sentenced for five years on counts 1 and 2, the sentences to run concurrently, and for five years on counts 3, 4 and 5, the sentences to run concurrently but consecutively to the counts 1 and 2 sentences and to

sentences theretofore imposed on him by the United States District Court for the District of Minnesota, Fourth Division. Buni Bessesen was acquitted on counts 1, 2 and 3, and was found guilty on counts 4 and 5. She was sentenced to one year on count 4 and placed on probation for a period of five years on count 5. The Bessesens have appealed. We affirm.

Henry Bessesen ("defendant") was an actor from 1937 to 1948. During that period, he used the name Henry Adrian; thereafter he used both names but appeared to prefer Adrian. In the early 1950s, he incorporated the Bessen Company in Illinois to distribute washing machines. He also organized another corporation known as Illinois Dishwasher and Remodeling Corporation. He opened checking accounts for the Bessen Company at the Upper Avenue National Bank of Chicago in 1953, for Illinois Dishwasher at Mid-America National Bank of Chicago in 1957, and a personal account for himself and his wife Buni, using the Adrian name, at Mid-America in 1959.

Bessen Company became inactive in 1956 or 1957 and Illinois Dishwasher ceased doing business in 1958 or 1959, but defendant did not close out either of the checking accounts. About the same time, defendant started a business in Chicago to provide credit cards for health expenses called Credit Health System. He opened a checking account for that organization at National Boulevard Bank of Chicago in 1959.

In 1960 defendant left Chicago and went to Arizona. The four bank accounts at the three Chicago banks were all kept open.

Exactly what happened to the Credit Health System when defendant went to Arizona was not made clear by defendant's testimony, but the total evidence on the subject shows the following facts: Defendant sold a franchise license to a Mr. Castelli in Tucson, Arizona, who (defendant presumed) in turn sold the license to Leah

Rosa Simpson in 1961. Mrs. Simpson's attorneys incorporated Credit Health System, District 3, Division 1 of Arizona. At this point defendant testified that Mrs. Simpson became his "boss." However, the office manager of Credit Health System, Tucson, testified that she was employed "for Mr. and Mrs. Adrian"; defendant "owned" the business, was its president and made the business decisions; the home office was at 600 South Michigan, Chicago; the number of employees fluctuated from 4 to 10 and one of the employees in 1960 was Mr. Castelli; and that Mrs. Simpson was "our landlord." Mrs. Simpson's attorney testified that Credit Health System of Arizona, District 3, Division 1, never was a going concern; that Mrs. Simpson owned the premises at 532 North Fourth Avenue, Tucson; that those premises were occupied by two of defendant's businesses—Commerce and Health Credit System and Commerce and Health Development Corporation; and that Mrs. Simpson was not defendant's boss.

In any event, defendant and his wife opened a checking account in their Adrian names at the Southern Arizona Bank of Tucson in 1960; they opened an account for the Two-Fund Health Credit System, a division of Arizona Credit Health System, at the Arizona Bank of Tucson in 1961.

In 1962, the Tucson Inn was owned by the Egbarth Corporation, the capital stock of which was in turn owned by Phil Baker and Lyndon Miner. Defendant testified that on October 15, 1962, Mrs. Simpson bought Baker and Miner's stock in Egbarth by executing and issuing a promissory note in the amount of $250,000 to each of them and by assuming a first mortgage held by the American Insurance Company for $600,000. Mrs. Simpson was supposed to invest an additional $100,000 in the Inn to convert the hotel rooms into efficiency apartments. Defendant, in return for his services as manager of the Inn, was to receive a one-third ownership when it became a paying proposition. He signed the notes as a co-signer

with Mrs. Simpson; he became president and his wife became secretary and treasurer of Egbarth Corporation; and the stock in Egbarth was transferred to defendant and his wife, who then signed the stock certificate to Mrs. Simpson in blank and delivered the stock to her.

Mrs. Simpson's attorney testified that Mrs. Simpson was 89 years old, frail and blind, and had periods of mental confusion and memory lapses; that she had income of about $10,000 a year; and that her assets consisted primarily of the real estate upon which was situated her home, which she sold in 1962 or 1963 for $100,000, less than $20,000 of the purchase price being in cash. He further testified that Mrs. Simpson had been advised by his law firm not to invest in the Tucson Inn; that she told him that she did not sign any notes in connection with it; and that when she was sued for $287,500 by Phil Baker in August, 1965, her defense was that if the note was signed by her at all, her signature was secured by trick, artifice and fraud by misrepresentation of the instrument signed.

Defendant described Mrs. Simpson as a "very wealthy woman" who was very active and used a large magnifying glass which she kept in her purse for reading. He admitted, however, that she was "very old looking" and could have been anywhere from 60 to 95 years of age. The defendant's office manager for the Credit Health System testified that Mrs. Simpson was "close to 80" and "she was almost blind."

In any event, defendant and his wife opened a checking account in the name of Second Fund Tucson Inn, a division of Egbarth Corporation, at the Bank of Tucson on February 19, 1963; they opened an account for the Bagdad Club and Carousel Club, which were part of the Tucson Inn, at the First National Bank of Arizona at Tucson on February 19, 1963.

At this point in time, defendant and his wife were signatories on four active checking accounts in three Chicago

banks and on four active accounts in four Tucson banks. The payment due each month on the Tucson Inn first mortgage was in excess of $5,000, the monthly payments due on the Baker and Miner notes were $1,900 each, and the Inn was losing about $3,000 each week. Defendant testified that Mrs. Simpson promised to pay the Tucson Inn expenses; that she did so for a time until she had put in about $40,000; and that she then gradually stopped paying those expenses.

Taking advantage of the fact that it takes several days to clear checks between banks in different cities and the fact that often banks will honor checks drawn against uncollected funds and accept overdrafts for a period of time, the defendants drew checks upon one bank where there were no or insufficient funds in favor of another bank; before the checks reached the drawee bank for payment other checks were drawn against another bank where there were no or insufficient funds and deposited in the drawee bank. When, as here, the checks must be drawn and passed in rapid succession in an endless chain, the procedure is characterized as check-kiting. The defendant's accelerated check-writing activity apparently began shortly after opening the last two Tucson accounts on February 19, 1963, and the tempo and volume quickly picked up until a crescendo was reached in May, 1963. One of the banks, the Mid-America National Bank of Chicago, discovered the abnormality of the defendants' account about May 28, 1963, and a few days later the check-flow was ended.

An internal auditor for the Post Office Department testified that the total deposits to the Two-Fund Credit Health System account at the Arizona Bank during the period of May 14 to May 24, 1963 amounted to $177,662, of which $114,630 was deposited from checks drawn on Chicago banks. Total deposits to the Arizona banks during this period were $443,372, of which $370,966 was made up of deposits of checks drawn on Chicago bank accounts. Total deposits to the Illinois banks during this period

totaled $300,267, of which $299,574 was deposited to the Chicago banks on checks drawn on the Arizona banks.

In four days $69,000 in worthless checks were deposited at the Arizona Bank; in three days $49,915 of worthless checks were deposited in the Bank of Tucson; in five days $43,000 of worthless checks were deposited at the First National Bank of Arizona; $51,801 of worthless checks were deposited to the Southern Arizona Bank and Trust Company; in a three-day period $31,000 in worthless checks were deposited to the account at the Mid-America National Bank of Chicago; and $25,388 was deposited to the Upper Avenue National Bank of Chicago during a six-day period. Deposits amounting to $349,000 in worthless checks were deposited during the seven-day period. The total amount of loss to four banks was $84,085.99.

Defendant conceded upon cross-examination that when he deposited those checks in those banks, he knew there were not enough funds to pay them all. An FBI agent testified that he met defendant in September, 1963, in Minneapolis, where defendant had moved in May, 1963; that defendant told him he had deposited checks upon accounts he knew had no or insufficient funds but he was able to take advantage of the several days' time lag that it took for the checks to clear from one bank to another; that on some days he had to write as many as a hundred checks and had to maintain a worksheet to keep track of all the checks; that at first he just used two or three banks but later he used all seven banks because he wanted to spread the risk around and minimize the potential loss to any one bank; and that he considered his checkwriting activities the same as having bank loans which matured every twenty-four hours.

Upon this appeal the defendant and his wife have contended (1) that certain instructions denied should have been given and others given should have been denied; (2) that prejudicial hearsay testimony was admitted; (3) that the trial court abused its discretion by denying de-

fendants' request for a continuance for the purpose of producing additional witnesses; and (4) that the evidence was insufficient to sustain the conviction of Buni Bessesen.

I

The defendants' first contention is that the district court failed to instruct the jury upon their theory of defense.

The defendant in a criminal case is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous. *United States* v. *Vole,* 435 F. 2d 774, 776 (7th Cir. 1970); *United States* v. *Grimes,* 413 F. 2d 1376, 1378 (7th Cir. 1969). The theory of the defendant and his wife in this case was that they entertained a reasonable expectation that sufficient funds would be deposited by Mrs. Simpson in time to pay the checks when they were ultimately presented for payment. This theory is supported by law. *United States* v. *Broxmeyer,* 192 F. 2d 230, 232-3 (2nd Cir. 1951); *Williams* v. *United States,* 278 F. 2d 535, 537 (9th Cir. 1960); *United States* v. *Gross,* 416 F. 2d 1205, 1212 (8th Cir. 1969), *cert. denied,* 397 U.S. 1013 (1970); *First National Bank* v. *Insurance Co.,* 424 F. 2d 312, 318-19 (7th Cir.), *cert. denied,* 398 U.S. 939 (1970); *People* v. *Rubin,* 223 Cal. App. 2d 825, 36 Cal. Rptr. 167 (1963). *See also* Annotation, "Reasonable Expectation of Payment as Affecting Offense Under 'Worthless Check' Statutes," 9 A.L.R. 3rd 719. The theory also had some foundation in the evidence, based upon the defendant's testimony that Mrs. Simpson had previously "covered" his overdrafts.

The defense tendered a long, rambling theory instruction for the defendant and a second instruction pertaining to his wife. Both of the defense theory instructions included a detailed description of the purported evidence and inferences the defense drew from that evidence. The district court rejected the two proffered instructions. In *Alaska Airlines* v. *Oszman,* 181 F.2d 353 (9th Cir. 1950), the court stated at page 353:

> "It is of course true that the theories of parties to a court action should be given the jury by way of instructions or charge and this the court adequately did. But this does not mean that a party has the right to have the jury charged upon every inference it thinks should be drawn from the evidence adduced. The court charged the jury in an unimpeachable manner as to the issues in the case which amply covered the theory of the parties—on the one side that the indebtedness existed, on the other that it never had existence. The court exercised its discretion by choosing not to comment upon or to attempt to analyze the evidence and it told the jury to weigh the evidence and find its verdict therefrom. The rejected proposed instructions, if given would have called attention more to a particular point in the case than to appellant's theory of the case. We think the court was under no compulsion to do this."

The defense did not attempt to alter the form of the instructions or to submit alternative instructions. The primary responsibility rests with counsel to make fair and proper requests to charge. *United States* v. *Leach,* 427, F. 2d 1107, 1113 (1st Cir.), *cert. denied,* 400 U.S. 829 (1970); *United States* v. *Hamilton,* 420 F.2d 1096, 1099 (7th Cir. 1970). The defendant in a criminal case will not ordinarily be heard to complain of the trial court's failure to set out in its charge his specific theory or theories of defense, unless he has himself formulated them into proper tendered instructions. *Apel* v. *United States,* 247 F. 2d 277, 282 (8th Cir. 1957).

However, in this case we need not rest on that principle; we can assume *arguendo* that this is a situation where a request for an instruction which is not in proper form may impose upon the court the duty to give a proper instruction, whether tendered or not, upon that particular subject matter. *Chicago & N.W. Ry. Co.* v. *Green,* 164 F. 2d 55, 61 (8th Cir. 1947); *United States* v. *Napue,* 401 F. 2d 107, 112 (7th Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969) .

Jury instructions must be considered in their entirety. The instructions here, taken as a whole and also in specific detail, fully expressed the legal principles applicable to the defense of both defendant and his wife that they relied in good faith upon a reasonable expectation of payment of the checks and, applicable to the wife alone, that she acted upon the direction of her husband. *United States* v. *Hamilton,* 420 F. 2d 1096, 1098 (7th Cir. 1970). The district court charged the jury in part:

> "Defendants have offered evidence of their good faith in making the representations alleged in the indictment. Good faith is a complete defense to the crime of mail fraud. In determining whether defendants acted in good faith or with the intent to defraud, you should consider all the facts and circumstances in the case. If you find that defendants acted in good faith they should be found not guilty.
>
> • • •
>
> "If you find that Mrs. Bessesen's acts, as they relate to the transactions in question, were performed solely at the direction and under the control of her husband, and without knowledge of the character and nature of the transactions that took place, then you must find her not guilty."

In addition, the trial court instructed the jury comprehensively upon the elements of the crime of mail fraud, the meaning of "knowingly" and "willfully," and the following instructions on "intent":

> "The crime charged in this case requires proof of specific intent before the defendants can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendants knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
>
> • • •

> "The phrase 'intent to defraud' used in the crime charged means that the act was done knowingly with the specific purpose to deceive in order to cause financial loss to another or financial gain to one's self."

These instructions go far beyond what the court considered a sufficient instruction regarding the theory of reasonable expectation of payment in *United States* v. *Broxmeyer*, 192 F.2d 230 (2nd Cir. 1951), where the court said at pages 232-3:

> "The charge is also challenged because it failed to define specifically enough the 'intent to defraud' which it said was a necessary element of both crimes. The judge did not tell the jury—in accord with defendant's requests—that there could be no such intent if Broxmeyer planned and expected to be able to meet all the checks at presentment time. The jury was told simply that they must find whether an intent to defraud existed from a consideration of all the circumstances of the case and the reasonable inferences to be drawn therefrom. We think that charge sufficient. The intent to defraud in this sort of offense is basically no different from the intent to defraud in any other kind of crime. Whenever a man has no real intention of cheating anyone out of anything, there is no intent to defraud. There is no reason to believe that this jury would go against the clear meaning of these words and find an intent to defraud had they actually believed that Broxmeyer intended and reasonably expected to be able to meet the checks, and that he had no notion of throwing the risk of nonpayment on anyone else."

The defendant and his wife also objected to the giving of the following instruction:

> "However, if you believe beyond a reasonable doubt that the defendants, when they put in circulation or caused to be put in circulation the checks which are

in evidence, knew that the funds in the bank accounts on which these checks were drawn were insufficient to pay these checks on presentation, and that the defendants further knew that in the ordinary course of events there would not be sufficient funds in the bank accounts of the drawee banks to pay these checks when they were presented other than by the deposit in rapid succession of other checks drawn by the defendants which they knew or should have known were insufficient fund checks themselves, in an endless chain, then you will be justified in finding that the necessary intent to defraud existed."

A virtually identical instruction was approved in *Deschenes* v. *United States,* 224 F. 2d 688, 692 (10th Cir. 1955). Most of the language in the instruction was first enunciated by this court in an early check-kiting case, *Federman* v. *United States,* 36 F. 2d 441, 442 (7th Cir.), *cert. denied,* 281 U.S. 729 (1929).

Finally in regard to instructions, defendant and his wife complain of the language in the charge, "If you find a defendant is guilty beyond a reasonable doubt of any one of the crimes charged in the indictment a verdict of guilty should be returned as to him," on the ground that "it gave the impression to the jury that a general verdict of guilty as charged in the indictment should be returned by them" in the event that the jury found a defendant guilty of any one of the five counts. The language objected to is part of an instruction included in the manual on jury instructions in criminal cases heretofore approved by this court.[1] The complete instruction from the manual was given in the present case; it includes the following language appearing before the portion objected to: "Defendants have been charged with separate crimes in the various counts of the indictment. You should give separate

[1] Manual on Jury Instructions in Federal Criminal Cases, Seventh Circuit Judicial Conference on Jury Instructions, §7.04 (1963), also reported at 33 F.R.D. 523, 606 (1964).

consideration, and render separate verdicts with respect to each defendant, and to each count." We do not believe that the jury would be confused or misled by the instruction as a whole, particularly where, as here, the verdict forms given to the jury offered the jurors the opportunity to find the defendant and his wife guilty on some counts and not guilty on others.

II

The defendants further contend that they were prejudiced by the admission into evidence of hearsay testimony through the government witness, Burt L. Haberman, an attorney from Tucson, Arizona, who had represented Leah Rosa Simpson. Mr. Haberman testified that Mrs. Simpson told him that she had not signed or co-signed the notes for the purchase of the Tucson Inn; and that in August, 1965, when Mrs. Simpson was sued by Phil Baker, the holder of one of the notes, for $287,500 plus interest, the primary defense was that if she had signed the note at all, her signature had been secured by trick, by artifice, by fraud, by misrepresenting the character of the instrument that she signed, not as a promissory note but as something else.

The defense attorney objected on the ground that "he is getting into the defense in another lawsuit." The district court overruled the objection. As Wigmore said, "A specific objection *overruled* will be effective to the extent of the grounds specified, and no further." 1 Wigmore, Evidence §18 at 339 (3rd ed. 1940). See also, *United States* v. *Indiviglio,* 352 F. 2d 276, 279-80 (2nd Cir. 1965), *cert. denied,* 383 U.S. 907 (1966). Judge Frank observed in *United States* v. *Rosenberg,* 195 F.2d 583, 596 n. 9 (2nd Cir.), *cert. denied,* 344 U.S. 838 (1952): "We know, too, that an able trial lawyer, for one or more of a variety of reasons, will often withhold an objection to the reception of hearsay. When he has done so, and it turns out that the jury's verdict is adverse to his client, the lawyer may not assert that reception as error." See also, *United States* v.

Marine, 413 F.2d 214, 218 (7th Cir. 1969, *cert. denied,* 396 U.S. 1001 (1970); *United States* v. *Cook,* 432 F.2d 1093, 1103 (7th Cir. 1970). Since the contention of hearsay advanced on appeal was not raised in the court below, this court will not entertain it in the absence of a showing of plain error, which is not shown here. *United States* v. *Turner,* 423 F.2d 481, 484 (7th Cir.), *cert. denied,* 398 U.S. 967 (1970).

In any event, however, the defendant, testifying on his own behalf, was permitted to describe many conversations he had with Mrs. Simpson with no one present, whereas Mr. Haberman's testimony related to statements made by Mrs. Simpson in the presence of the defendant at two separate meetings in Mr. Haberman's law office. Since the defendant opened the door to evidence on the subject of his relation to Mrs. Simpson, he cannot complain that the government was permitted to introduce other testimony bearing upon that field of inquiry. *United States* v. *Regents of New Mexico School of Mines,* 185 F.2d 389 (10th Cir. 1950). The testimony regarding the other lawsuit was also germane to the subject matter introduced by the defendant. Professor McCormick refers to the right to "fight fire with fire." McCormick, Evidence §57, page 132 (1954). Neither party called Mrs. Simpson as a witness.

Under the circumstances we find no prejudicial error in the admission of Haberman's testimony.

III

The defendants further contend that the trial court abused its discretion by denying defendants' request for a continuance for the purpose of producing additional witnesses after both sides had rested their cases. The defendants concede that it is well established that the trial court has a large discretion with respect to order of proof and permitting a party to reopen its case after it has rested. *Rhyne* v. *United States,* 407 F.2d 657 (7th Cir. 1969). Nevertheless the defendants argue that they were preju-

diced by not being able to reopen the case to procure additional witnesses from Arizona, principally Mrs. Simpson.

The government put fifteen witnesses on the stand, nine of whom were residents of Arizona. The defendant and his wife were the sole witnesses on their own behalf. Since the defendants' only defense was their alleged reasonable expectation that Mrs. Simpson would cover their bad checks, they had to know from the day the indictment was filed on May 23, 1968, to the time of the trial more than a year later that Mrs. Simpson, assuming that she would testify favorably to them, would be their prime potential witness. The fact that the defendants failed to call her during the trial and elected instead to rely upon their own testimony as to what Mrs. Simpson had done and told them was a calculated risk they took. They cannot complain that the risk failed. The trial court properly exercised its discretion.

IV

Finally, the defendants contend that the evidence was insufficient to sustain the conviction of Buni Bessesen.

The five counts in the indictment related to five separate mailings of specific checks. The check in count 1 was made payable to defendant Henry Adrian; the checks in counts 2 and 3 were made payable to Credit-Health Systems; and the check in counts 4 and 5 were made payable to B. A. Adrian, who is Buni Bessesen. The jury found Mrs. Bessesen not guilty as charged in counts 1, 2 and 3 but guilty as charged in counts 4 and 5.

Reviewing the evidence in a light most favorable to the government, *United States* v. *Lawler*, 413 F.2d 622 (7th Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970), the record reflects more than sufficient evidence to justify the jury finding that Buni Bessesen had knowledge of the "check-kiting" scheme and was thus, beyond a reasonable doubt, guilty of counts 4 and 5 of the indictment. As a secretary to her husband, she signed hundreds of checks and deposit slips as evidenced by the exhibits admitted into evidence.

She admitted signing a large number of checks, some of which were filled out in blank prior to her signing. Some of these checks, which she subsequently endorsed, were payable to her. In addition, she thought that it was unusual that checks were payable to her totalling $43,000, since she didn't earn the money and didn't even know why they were payable to her. She contended that she merely gave these checks to her husband and didn't question him about it. Many of these checks were returned for insufficient funds. In addition, she signed all the corporate cards for the various bank accounts and was listed as a corporate officer in the corporate resolutions, including corporations that were nonexistent.

The knowing participation of Buni Bessesen in a "check-kiting" scheme may be established circumstantially even though no direct evidence was introduced to show that she did in fact know that she was writing checks on insufficient funds. The above facts constituted substantial evidence, even though circumstantial in nature, by which the jury could find beyond a reasonable doubt that Buni Bessesen had the requisite knowledge and intent. This is evidenced by the jury's specific finding of requisite knowledge as to Buni Bessesen and thus her guilt as to counts 4 and 5, in light of the instruction set forth in section I of this opinion that she be found not guilty if she lacked such knowledge. The jury did not believe Buni Bessesen's contention that she had no knowledge of the "check-kiting" scheme in light of the numerous checks executed by her on Chicago banks and deposited by her in Arizona banks and checks executed by her on Arizona banks and deposited by her in Chicago banks, all within the same short period of time.

We conclude that the evidence was sufficient to sustain the conviction of Buni Bessesen.

The judgments of conviction of Henry Bessesen and Buni Bessesen are affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Thursday, August 19, 1971.

Before

Hon. Roger J. Kiley, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 18319 vs.

Henry Bessesen and Buni A. Bessesen,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Thursday, August 26, 1971.

Before

Hon. Robert A. Sprecher, Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 18319 vs.

Henry A. Bessesen and Buni A. Bessesen,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of counsel for defendant-appellant and memorandum in support thereof,

It Is Ordered that the issuance of the mandate of this Court be stayed to and including September 24, 1971, in accordance with the provisions of Rule 41 (b) of the Federal Rules of Appellate Procedure.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-390

HENRY BESSESEN AND BUNI BESSESEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1971. A petition for rehearing was denied on August 19, 1971. The petition for a writ of certiorari was filed on September 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

447-072—71

QUESTIONS PRESENTED

1. Whether petitioners may raise, for the first time in this Court, the claim that their right to a speedy trial was violated by the delay between the commission of the offenses and the date of the indictment.

2. Whether petitioners' rights of confrontation were violated by the admission of allegedly hearsay testimony not objected to at trial.

3. Whether the instructions failed to set forth the theory of the defense.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, Henry Bessesen was convicted on each count of a five count indictment charging mail fraud in violation of 18 U.S.C. 1341 and was sentenced to two consecutive five year sentences. His wife, Buni Bessesen, was found guilty on two counts and was sentenced to one year on one count and placed on five years probation on the other.

The mechanics of petitioners' financial transactions are set forth in detail in the opinion below, the accuracy of which petitioners admits. In brief, the evidence showed that Henry Bessesen managed the Tucson Inn which was owned by Mrs. Leah Rosa Simpson. The fraud consisted of a "check-kiting" scheme in which petitioners deposited over $350,000 in bad checks in various banks located in Tucson, Arizona, and Chicago, Illinois.

Henry Bessesen testified that Mrs. Simpson had purchased the Tucson Inn in 1962 by executing two

$250,000 promissory notes and assuming a $600,000 mortgage and that he was a co-signer of the notes. (Tr. 566, 664). He acknowledged that he knew the funds were insufficient when he wrote the checks. The thrust of his defense was that he reasonably expected Mrs. Simpson to "cover" the checks. (Tr. 571, 653, 655.) He described Mrs. Simpson as a very active and energetic woman with good eyesight who was capable of taking care of herself in business transactions (Tr. 552, 658, 661, 714).

In rebuttal the government called Mr. Haberman, Mrs. Simpson's attorney, who testified that Mrs. Simpson was a frail, elderly blind woman who suffered from memory lapses. He stated that, prior to the signing of the notes, Mrs. Simpson had consulted with him a number of times, usually with Mr. Bessesen present, and that he advised her not to sign any notes (Tr. 771, 784). The following colloquy then occurred (Tr. 787–789):

> (Prosecuting Attorney) Q. Who else was present at that time?
>
> (Mr. Haberman) A. Mr. D'Antonio, Mr. Raymond F. Hayes, another member of our firm, and Mr. Adrian [petitioner] * * *.[1]
>
> Q. Would you please relate the substance of that conversation.
>
> A. We stated to Mr. Adrian that we had heard rumors among real estate circles in town that * * * Mr. Adrian was operating the Tucson Inn and had somehow purchased the stock, and we wanted to know whether or not he had done

[1] Mr. Bessesen had formerly been an actor and often used his stage name, Adrian.

so by getting Mrs. Simpson to co-sign the notes, because we had talked to Mrs. Simpson when we heard these rumors and asked her if she had done it and she said no, and he said yes, that she had co-signed the notes.

Q. In regard to those promissory notes, was that the last you heard of those notes, sir?

A. No, it was not, unfortunately.

Q. When was the next time that those promissory notes were brought to your attention?

A. In August—well, one of them in August of 1965 when she was sued for $287,500 plus interest * * *.

Q. What was your primary defense to that lawsuit?

A. The primary defense was that if she had indeed signed the note at all, her signature on the note was secured by trick, by artifice, by fraud, by misrepresenting the character of the instrument that she signed as a promissory note—not as a promissory note but as something else.

(Defense Counsel) Mr. OLIVER. I object. He is getting into the defense in another lawsuit.

The COURT. Do you have any comment?

(Prosecuting Attorney) Mr. KRAJCIR. Well, your Honor, I think the defendant has made those promissory notes the key to his case, and anything that sheds light on those promissory notes is going to be of assistance to this jury.

The COURT. He may answer * * *.

ARGUMENT

1. Petitioners contend that they were prejudiced by the approximately five year delay between the commission of the offenses in 1963 and the return of the

indictment in 1968. The question whether an indictment may be dismissed because of pre-indictment delay is before this Court in *United States* v. *Marion*, No. 70–19, this Term. However, the resolution of this case need not await that decision since petitioners did not file a motion to dismiss the indictment and, in addition, did not raise this issue below. Thus there is no record upon which this Court can determine whether the delay was reasonable and justified and whether it was prejudicial to the petitioners. For this reason they should not be permitted to raise the issue for the first time in this Court. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2. Moreover, since no witnesses were lost and the evidence was preserved in the form of bank records, it appears unlikely that petitioners were prejudiced by the delay.

2. Petitioners at trial never objected at all to testimony by Mrs. Simpson's lawyer concerning his statement to petitioner that Mrs. Simpson denied signing the notes, and objected to his statement of the theory upon which Mrs. Simpson was defending the lawsuit merely on grounds of irrelevance, not hearsay. The relevancy objection was properly overruled as the testimony was clearly relevant to rebut petitioners' defense. The trial judge was not accorded an opportunity to rule on any hearsay claim. In light of this, petitioners may not now raise such a claim. *United States* v. *Indiviglio*, 352 F. 2d 276, 279–280 (C.A. 2); *United States* v. *Turner*, 423 F. 2d 481, 484 (C.A. 7), certiorari denied, 398 U.S. 967.

Moreover, the statement concerning Mrs. Simpson's defense was not hearsay. As Mrs. Simpson's attorney, Mr. Haberman, was testifying on the basis of personal firsthand knowledge of the defense he, himself, had presented on her behalf. This testimony was admissible in rebuttal because it was inconsistent with petitioners' defense of good faith expectation of payment. *United States* v. *Wilson*, 439 F. 2d 1081, 1082 (C.A. 5).

The other reference to Mrs. Simpson—her attorney's testimony that he told petitioner that Mrs. Simpson had denied signing the notes—occurred not as the attorney's reciting an extra-judicial declaration of Mrs. Simpson, but in the course of his recounting a conversation with the petitioner, and was merely a part of the context of petitioner's admission to Mrs. Simpson's lawyer that Mrs. Simpson had in fact signed the notes against her attorney's advice. Moreover, as noted, this passing reference was not objected to at all by defense counsel.

3. Petitioners argue that the court's failure to charge the jury in the language tendered by defense counsel denied him due process of law. Petitioners tendered a lengthy, confusing set of instructions (Tr. 867–870), which included a detailed description of the purported evidence and inferences petitioners drew therefrom. Since much of this charge involved facts in dispute the trial judge properly rejected the charge as argumentative (Tr. Supp. 18). As the courts below held, the trial court's charge adequately covered the points of law and the substance of the requested in-

structions (Pet. App. 12a). The specific instruction concerning intent to defraud (Tr. 911–914) explained all the requisite elements of the offense. See *United States* v. *Broxmeyer,* 192 F. 2d 230, 232–233 (C.A. 2). The court's charge regarding reasonable expectations of payment (Tr. 919) was also more than adequate. See *Deschenes* v. *United States,* 224 F. 2d 688, 692 (C.A. 10). Mrs. Bessesen's defense, that she was under the control and direction of her husband, was fully explained (Tr. 922).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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